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Joint bank accounts and survivorship

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Abstract

Who is beneficially entitled to the money deposited in a joint bank account? In the great majority of cases it is clear that the money is jointly owned and will pass on the death of one of the account holders to the survivor. However, things are not always simple and the law then has to decide as to the ownership of the money in a dispute between the surviving account holder and the estate of the deceased. The decision of the Judicial Committee of the Privy Council in *Whitlock v Moree,* a case on appeal from the Court of Appeal of the Bahamas is the latest decision on this topic.

Key words

Banks, Joint account, Survivorship

Introduction

Who is beneficially entitled to the money deposited in a joint bank account? In the great majority of cases it is clear that the money is jointly owned and will pass on the death of one of the account holders to the survivor. However, things are not always simple and the law then has to decide how to resolve a dispute between the surviving account holder and the estate of the deceased as to the ownership of the money in the account. In short, a court may need to decide whether a decision to set up a joint bank account was designed merely to create a mechanism as to how funds were to be handled or whether it is intended as a transfer of the beneficial title to the funds.

The decision of the Judicial Committee of the Privy Council in *Whitlock v Moree,*[1] a case on appeal from the Court of Appeal of the Bahamas is the latest decision on this topic.

The Facts

The facts concerned a wealthy individual L who, at the relevant time (November 2009), was in his mid 90s. He died in February 2010. He had a close friend M. Under the terms of L's will, M was to receive both L's house and a fixed bequest of $55,000 from the estate, which included 'cash in banks.' The dispute concerned a joint bank account opened in November 2009. At the time of L's death it contained a credit $190,000 all of which had been contributed by L. The issue was whether that sum passed to M by survivorship or was part of L's estate on the basis that L had retained beneficial ownership of the money.

At the time of opening the account, L and M had signed an Account Opening form which contained at clause 20 a term which, if effective, resolved the case in M's favour. It stated:

> 'JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder).'

The only other relevant evidence was contained in the account opening form. This contained, in a box headed 'State Purpose of Account', a manuscript note which stated: 'to pay utilities'

The evidence on the intention of the parties was therefore ambiguous. L had clearly intended to make substantial gifts to M under his will. However, this joint account had been separated out. The 'utilities' annotation which had been made by a bank official suggested that the joint account has been set up as a matter of convenience merely to enable M to administer the affairs of an elderly person, although the amount of money in the account was far in excess of normal expenditure on such utility items (on the other hand, the contingency of providing care for an individual in his 90s may have been part of the thinking behind the arrangement).

Lord Brigg's majority judgement in the case identified the central issues before the court as whether:

> (1) Did clause 20 deal with the beneficial ownership of the joint account, or merely with the bare legal title to the chose in action against the bank represented by the account?
>
> (2) Is the fact that L and M opened the joint account by means of a signed written application containing clause 20 determinative of its beneficial ownership, as at the date of L's death?

Proceedings

On L's death, the residuary beneficiaries of his estate sought a declaration that M held the sums in the joint account on trust for the estate. Proceedings at both first instance and in the Bahamas Court of Appeal proceeded on the assumption that M would hold the sums in the account on resulting trust for the estate unless, the burden being on him, he could prove that L had intended to make a beneficial gift of the money to him. The judge held that this meant that he had to consider all of the evidence and determine on the balance of probabilities whether M had satisfied the burden of proof on him. He held that the burden of proof had not been satisfied. The Court of Appeal took the opposite view. That decision was based in part on a finding that the judge had failed to place sufficient weight on the terms of the Account Opening form (ie clause 20).

In the majority speech in the Privy Council, Lord Briggs noted that the issue had been raised previously in many common law courts. However, given the variety of views expressed in those cases, he preferred to approach this case on the basis of first principles.

The central proposition which he derived from Lord Upjohn's speech in *Vandervell v IRC*[2] *was* that 'any issue as to what that beneficial ownership is, falls to be decided as a matter of construction of the instrument, which is an objective process, in which evidence as to the subjective intention of the maker of the instrument is inadmissible.' In addition, he was clear that: 'co-owners receiving a transfer of property into joint names may themselves declare their agreement as to the beneficial interests on which that property is or is to be held and, if they do so in a written instrument, such as the conveyance to them, the identification of those beneficial interests will again be a matter of construction of the instrument, and recourse to doctrines of resulting, implied or constructive trust is impermissible.' Resulting trusts thus operate as one of the techniques available to a court when no express declaration as to the beneficial interests in the property has been made.

Lord Briggs was clear that there is no reason why these principles should not apply to funds in a bank account. The rights which the account holders have against the bank

derive wholly from their contract with it as set out in the account opening document. But, in addition, that document can serve to transfer rights in a fund between account holders as well as defining the rights of those persons against the bank. Account opening documents can thus govern both the legal and equitable interests in a joint bank account.

It followed from this analysis that it is a matter of construction as to what disposition has actually been made by such a document. There is no single rule or presumption applying to joint accounts: it is always a matter of construction. On the facts of the case, clause 20 was therefore held to be decisive in M's favour. Given the explicit terms of the document, it was inappropriate to consider the subjective intentions of the account holders or to resort to a presumption that a resulting trust would operate in favour of L's estate. The issue was to be determined as a matter of law according to the correct construction of the document: it was not a matter of fact. Lord Briggs added that a consideration of the intention of the parties would always be difficult in a case such as had arisen as one of the account holders would be dead and the survivor would clearly have an incentive to argue in favour of survivorship. As the account might have been opened many years previously independent evidence of the parties' intentions at that time might well be lacking.

The majority also made clear that it did not accept the approach found in some of the earlier decisions to the effect that terms in an Account Opening agreement would relate only to the legal and not the beneficial title to the funds saying that. 'In the Board's view, there can be no general rule that account agreements are only about legal title, or only about the relationship between the account holders and the bank, rather than their relationship as beneficial owners inter se. In each case it will depend upon the true construction of the relevant agreement.' In so far as the Supreme Court of Canada decisions in *Niles v Lake*[3] and *Pecore v Pecore*[4] supported confining the role of contract terms to determining legal title, Bahamian law was held to be different. On the facts of the case there had here been a clear declaration of the beneficial interests made in the Account Opening form.

Conclusion

It seems highly likely that, irrespective of the position in Canadian law and Singaporean law,[5] *Whitlock* will come to represent the law in England as well as in the Bahamas. The main authority relied on by both the majority and mnority was the English case of *Aroso v Coutts & Co.*[6]

The clarity provided by this decision will undoubtedly be welcomed by banks. It will tend to ensure that they can avoid becoming embroiled in litigation of this kind. The case represents another example of courts permitting banks to determine results by use of standard form contractual terms even though evidence may exist that the facts were otherwise. There is a parallel here to the results in the 'contractual estoppel/basis clauses' cases in which banks have been permitted, on the basis of contractual terms, to deny that they have given advice to customers as to products that were being purchased (EG *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221).

However, if the case is followed generally, it has the potential, by excluding any evidence of the facts and of the intention of the parties, of producing unsatisfactory results in some cases. The standard form terms used by banks will now almost certainly be drafted so as to determine the result in almost all cases and the drafting is likely to favour a beneficial transfer in circumstances in which all of the money has been deposited by one account holder. As Lord Carnwath says in the minority judgement, account terms are drawn up by banks in their interests: account opening documents are not the most natural mechanism with which to dispose of a large sum of money.

It is possible that cases may arise in which a clear intention by a party not to transfer the beneficial interest in money held in a newly opened joint account will be overridden by standard terms. One would hope than banks handling applications to open joint accounts will be alive to this risk and will counsel customers as to the legal effect of what they are doing.

In particular, use of the joint account mechanism to handle a person's affairs as a simpler alternative to setting up a power of attorney will carry the risk of frustrating that person's will. As Lord Carnwath says in his dissenting speech in *Whitlock*: 'from the point of view of the customer, the purpose of a bank account is not generally seen as to effect the transfer of property in the longer term, but rather to provide a convenient vehicle for holding and dealing in money for the time being.' Indeed, the decision in *Whitlock* does increase the risk of relatives inducing someone to use the joint account mechanism as a method of benefiting themselves by taking a fund outside of an estate.

[1] [2017] UKPC 44.
[2] [1967] 2 AC 291.
[3] [1947] SCR 291.
[4] 2007 SCC 17.
[5] See *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR 783.
[6] [2002] 1 All ER (Comm) 241.